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Women Judges: Gendering Judging, Justifying Diversity

DERMOT FEENAN*

The under-representation of women in judicial office has led to calls for greater female representation based on an argument that women offer a different voice from that of men. This argument has largely foundered, and a more recent rationale rests on the need for diversity in the judiciary. However, the disadvantage experienced by women applicants to judicial office is rooted in deeply entrenched structural discrimination and exclusion, imbricated in the constitution of the judge, judging, and judicial authority as male, masculine, white, heterosexual, able-bodied, and class-privileged. Arguments for wider representation in judicial office need to address more effectively how the judge, judging, and judicial authority are constituted. A survey of women holders of judicial office in Northern Ireland confirms this exclusion. While few respondents in the survey support the concept of a different voice, many identify distinctive approaches which can potentially enrich notions of judging and judicial authority.

* School of Law, University of Ulster, Newtownabbey BT37 0QB, Northern Ireland
d.feenan@ulster.ac.uk

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INTRODUCTION

The under-representation of women in judicial office in many countries¹ has led to a range of rationales for their increased representation. These rationales include equality of opportunity, representativeness, and, most recently, the need for diversity. Some of these rationales are based on broader arguments favouring, for instance, democratic legitimacy or enhancement of public trust and confidence in the judiciary. It has also been argued that women will improve justice by judging differently from men, by bringing a different voice, perhaps even changing the position of women in law more generally. There has been little attempt, however, to work through the relationship between these arguments, some of which bear different theoretical underpinnings.² Similarly, there has been little academic attempt systematically to survey the views of women judges about rationales for reform of the system of appointments. Nonetheless, significant reforms of the processes, procedures, and criteria for appointment have been implemented in the United Kingdom and elsewhere. Most of these reforms are based on equal opportunities measures. Few have engaged with the structural or symbolic discriminations facing women. As the momentum develops for diversity in judicial office nationally and at the international level,³ it will become increasingly important to clarify the relationship between these rationales, with particular reference to the experience of those under-represented groups. This article notes, however, that these rationales do not address the symbolic exclusion of women from traditional notions of judging and judicial authority. These notions are based primarily on male-centred perspectives, norms, and images, which are linked to historic broader structural exclusion of women from judicial office. The article argues, with reference both to the existing literature and data from a small survey of women judges in Northern Ireland, that this traditionally under-represented group appears to offer additional understandings of the role of judging which challenge traditional notions of judging and judicial authority. It is suggested that such understandings, which emphasize the distinctiveness of background and experience (contrapuntal to the assumed neutrality of judging), can enhance the diversity rationale for more women (and indeed other under-represented groups) being appointed to judicial office.

The article first outlines the rationales for more women judges, then proceeds to identify how notions of judging and judicial authority exclude

1 U. Schultz and G. Shaw (eds.), *Women in the World's Legal Professions* (2003).

2 However, see K. Malleon, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Feminist Legal Studies* 1–24; K.R. Johnson and L. Fuentes-Rohner, 'A Principled Approach to the Quest for Racial Diversity in the Judiciary' (2004–05) 10 *Michigan J. of Race & Law* 5–53.

3 K. Malleon and P.H. Russell (eds.), *Appointing Judges in an Age of Judicial Power* (2006).

women, before finally arguing, based on findings from the survey and related literature, for an expanded diversity rationale.

RATIONALES FOR MORE WOMEN JUDGES

An early rationale for greater representation in the United States of America was that women judges would ‘improve the legal status of women’, a hope that was not fully realized.⁴ Subsequently, a different argument emerged, energized by Carol Gilligan’s thesis that women bring an ethic of care to issues of justice in contrast to the rights-based approach of men.⁵ One of the better-known judicial views in support of this thesis came in 1990 with the paper by Justice Bertha Wilson, of the Supreme Court of Canada, ‘Will Women Judges Really Make a Difference?’⁶ While there has been some rehabilitation of Gilligan’s thesis,⁷ her approach has sustained heavy criticism.⁸ Former Justice Sandra Day O’Connor of the US Supreme Court regarded the very question of whether women would judge differently as both ‘dangerous and unanswerable’.⁹ The key objections – with which this author agrees – are that such an argument risks reifying certain ‘feminine’ ideals perceived as unique to women, and fails to account for significant differences between women based, for example, on sexual orientation, class, caste, and race. A further objection is that it does not account for the constraints on women of legal professional socialization. Even those surveys which attempt to detect difference, struggle, perhaps unsurprisingly, to support the claim, and, indeed, some negate the assertion.¹⁰

4 B.B. Cook, ‘Will Women Judges Make a Difference in Women’s Legal Rights? A Prediction from Attitudes and Simulated Behaviour’ in *Women, Power and Political Systems*, ed. M.N. Rendel (1981) 216–39, at 217.

5 C. Gilligan, *In a Different Voice* (1982); C. Menkel-Meadow, ‘Portia in a Different Voice: Speculations on a Woman’s Lawyering Process’ (1985) 1 *Berkeley Women’s Law J.* 39–63; L. Goldstein, *Feminist Jurisprudence: The Difference Debate* (1992).

6 B. Wilson, ‘Will Women Judges Really Make a Difference?’ (1990) 28 *Osgoode Hall Law J.* 506–22.

7 E. Rackley, ‘From Arachne to Charlotte: An Imaginative Revisiting of Gilligan’s *In a Different Voice*’ (2007) 13 *William & Mary J. of Women and the Law* 751–74.

8 B. Hamilton, ‘Criteria for Judicial Appointment and “Merit”’ (1999) 15 *Queensland University of Technology Law Rev.* 10–22; H. Sommerlad, ‘Can Women Lawyer Differently? A Perspective from the UK’ in Schultz and Shaw, op. cit., n. 1, 192–224; and Malleson, op. cit., n. 2.

9 S. Day O’Connor, ‘Portia’s Progress’ (1991) 66 *New York University Law Rev.* 1546–58, at 1557.

10 For a review of a number of surveys pre-2003, see, for example, chapters in Schultz and Shaw, op. cit., n. 1. Examples of subsequent surveys – finding differences between men and women judges in some discrimination claims – include: F.O. Smith, ‘Gendered Justice: Do Male and Female Justices Rule Differently on Questions of Gay Rights?’ (2005) 57 *Stanford Law Rev.* 2087–134; J.L. Peresie,

The debate on 'different voice' has also tended to essentialize and de-contextualize the law. It is essentialized in that it focuses on decisional outcomes, and ignores other aspects of judging. Law is reduced to its judgments. This is perhaps an easy failing for academic lawyers who are trained in the forensic study of judgments, but it means comparatively little to members of the public who are likely to assess a case and its adjudication in terms of the fairness of the process and whether they 'had their day in court'.¹¹ Quantitative methods which focus only on decisional outcomes, without additional qualitative research, also ignore the women's voices about which they sometimes purport to be concerned.¹² Moreover, such quantitative studies on decisional outcomes also typically fail to explore critically how the concepts, pathways to, and practices of the judge are constituted.¹³

There has, therefore, been a move in the United Kingdom and elsewhere away from the 'different voice' rationale to two related arguments. First, an argument based on equality of opportunity. As Baroness Hale has argued, 'all properly qualified and suitable candidates should have a fair crack of the whip and an equal chance of appointment, being considered impartially and solely on their merits and not in some other way or for some other reason.'¹⁴ The second argument is that the judiciary should be reflective of society, not drawn from a narrow demographic background. Certainly within England and Wales the judge is traditionally a man from a narrow class and educational background of independent, fee-paying schools and Oxbridge.¹⁵ In 2004, 75 per cent of the judges in the Judicial Committee of the House of Lords and in the Appeal and High Courts were drawn from such schools (half of which were boarding schools), the highest percentage of any profession,¹⁶ and 81 per cent attended Oxford or Cambridge Universities. The argument that the judiciary should instead be reflective of society has occasionally been couched in terms of 'democratic legitimacy',¹⁷ or

'Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts' (2004–2005) 114 *Yale Law J.* 1759–90.

- 11 See, for example, R. Moorhead, M. Sefton, and L. Scanlan, *Just Satisfaction: What Drives Public and Participant Satisfaction with Courts and Tribunals?* Ministry of Justice Research Series 5/08 (2008); T. Tyler, 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Society Rev.* 103–35.
- 12 See, for example, D.R. Songer, S. Davis, and S. Haire, 'A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Court of Appeals' (1994) 56 *J. of Politics* 425–39.
- 13 See, for example, S. Westergren, 'Gender Effects in the Court of Appeals Revisited: The Data Since 1994' (2003–2004) 92 *Georgetown Law J.* 689–708.
- 14 B. Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' (2001) *Public Law* 489–504.
- 15 J.A.G. Griffiths, *The Politics of the Judiciary* (1997, 4th edn.).
- 16 Sutton Trust, *Sutton Trust Briefing Note: The Educational Backgrounds of the UK's Top Solicitors, Barristers and Judges* (2005).
- 17 Hale, *op. cit.*, n. 14.

‘strengthen[ing] the rule of law’,¹⁸ though others see this as a component of the equality ground.¹⁹ This rationale has often included subsidiary arguments about increasing public confidence and trust in the judiciary,²⁰ as there is some evidence that lack of diversity in the judiciary undermines public confidence in the judiciary, both on the grounds of gender²¹ and of ethnicity.²²

In the late 1990s in England and Wales, the need for greater numbers of women, and minority ethnic groups, in the judiciary was conveyed through the language of a ‘diverse judiciary’. This became a key rationale used by the Lord Chancellor’s Department,²³ its replacement, the Department for Constitutional Affairs in England and Wales,²⁴ and Judicial Appointments bodies across the respective jurisdictions of the United Kingdom.²⁵ Indeed, the promotion of diversity is now an express legislative duty for one of the judicial appointments bodies in the United Kingdom,²⁶ and is indirectly reflected with reference to the duties of the other two bodies to appoint a judiciary that is reflective²⁷ or representative of the community.²⁸ The

18 D. Pannick, *Judges* (1987) at 54.

19 Malleon, op. cit., n. 2.

20 P.H. Russell, ‘Conclusion’ in Malleon and Russell, op. cit., n. 3, 420–35, at 434.

21 H. Genn, *Paths to Justice: What People Do and Think About Going to Law* (1999).

22 S. Shute, R. Hood, and F. Seemungal, *A Fair Hearing?: Ethnic Minorities in the Criminal Courts* (2004). For similar findings in relation to tribunals, see H. Genn, B. Lever, L. Gray, and N. Balmer, *Tribunals for Diverse Users*, DCA Research Series 1/06 (2006).

23 Lord Chancellor’s Department, *Judicial Appointments in England and Wales – The Appointment of Lawyers to the Professional Judiciary – Equality of Opportunity and Promoting Diversity* (2001).

24 Department of Constitutional Affairs, *Increasing Diversity in the Judiciary* (CP 25/04) (2004); *Judicial Diversity Strategy*, 17 May 2006; *Judicial diversity strategy: measures of success*, July 2006. The Department was replaced by the Ministry of Justice in 2007.

25 Judicial Appointments Board for Scotland; Judicial Appointments Commissioners for England and Wales; and the Commissioner for Judicial Appointments for Northern Ireland; and their respective replacements; the Judicial Appointments Commission (England and Wales) and the Northern Ireland Judicial Appointments Commission.

26 In England and Wales: Constitutional Reform Act 2005, s. 64(1) (subject to s. 63(2), and s. 63(3)). The promotion of ‘equality and diversity’ is one of the three duties of the new Commission for Equality and Human Rights in Britain (Equality Act 2006).

27 In Northern Ireland: Justice (Northern Ireland) Act 2004, s. 3, amending s. 5(8), Justice (Northern Ireland) Act 2002.

28 In Scotland, the Judicial Appointments Board for Scotland is required by virtue of an executive mandate issued in 2001 by the Scottish Ministers to consider ways of recruiting a judiciary which is as representative as possible of the communities in which they serve. The Judicial Appointments Board for Scotland, *Annual Report 2002–2003* (2003) at 3.

language of diversity is now commonplace in recruitment, selection, and retention policies within the workplace.²⁹

Earlier arguments for diversity or diversification had occurred in Canada³⁰ and the United States,³¹ originally on the grounds of race.³² These arguments for diversity in the judiciary influenced substantial reform of the processes, procedures, and criteria for judicial appointments in the United Kingdom.³³ And, yet, some critics remain to be convinced that these reforms will be sufficient.³⁴ Recent scholarship has sought to address the structural discrimination³⁵ and symbolic exclusion³⁶ facing women in the legal profession. It is argued that even if equal representation is achieved, women may still be treated as ‘outsiders’ within judicial office.³⁷ The following section provides some illustration of that symbolic exclusion.

MALE JUDGES, JUDGING, AND JUDICIAL AUTHORITY

Historically, the judge has been male. This is reflected in how the public tends to think of the judge.³⁸ The image of the male judge is reproduced and reaffirmed through a variety of cultural channels; uncritical accounts of the leading judges, the media, film, and portraiture. The persistent association of

- 29 A.M. Konrad et al., *Handbook of Workplace Diversity* (2005); European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, *The Business Case for Diversity: Good Practices in the Workplace* (2005).
- 30 Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (1993).
- 31 T.G. Walker and D.J. Barrow, ‘The Diversification of the Federal Bench: Policy and Process Ramifications’ (1985) 47 *J. of Politics* 596–617.
- 32 B.L. Graham, ‘Toward an Understanding of Judicial Diversity in American Courts’ (2004–05) 10 *Michigan J. of Race & Law* 154–93, fn. 2.
- 33 The Constitutional Reform Act 2005, s. 64(1) requires the Judicial Appointments Commission to ‘have regard to the need to encourage diversity in the range of persons available for selection for appointments’. In Northern Ireland, the Justice (Northern Ireland) Act 2004 s. 3 places a duty on the Northern Ireland Judicial Appointments Commission to secure a judiciary which is reflective of the community in Northern Ireland.
- 34 See, for example, C. Dyer, ‘First 10 high court judges under new diversity rules’ *Guardian*, 28 January 2008, at 1. See, also, M. Thornton, ‘EEO in a Neo-Liberal Climate’ (2001) 6 *J. of Interdisciplinary Gender Studies* 77–104; D. Ben-Galim, M. Campbell, and J. Lewis, ‘Equality and Diversity: A New Approach to Gender Equality Policy in the UK’ (2007) 3 *International J. of Law in Context* 19–33.
- 35 E. Skordaki, ‘Glass Slippers and Glass Ceilings: Women in the Legal Profession’ (1996) 3 *International J. of the Legal Profession* 7–43.
- 36 M. Thornton, ‘Authority and Corporeality: The Conundrum for Women in Law’ (1998) 6 *Feminist Legal Studies* 147–70.
- 37 C. L’Heureux-Dubé, ‘Outsiders on the Bench: The Continuing Struggle for Equality’ (2001) 16 *Wisconsin Women’s Law J.* 15–30; S. Abrahamson, ‘The Woman Has Robes: Four Questions’ (1984) 14 *Golden Gate Law Rev.* 489–503.
- 38 Genn, op. cit., n. 21.

the judge with men, notwithstanding the entry of women into judicial office, is deeply embedded in working practices and presentation. The traditional working day and week of the judge was designed to suit men. While these practical arrangements have kept many women out, a range of associations between men and judging have also excluded women. The long-hours culture and competitive ethos of the practising Bar – which in the United Kingdom was traditionally the point of entry to higher judicial office – tends to reflect masculine values.³⁹ A range of attributes for Silk (senior counsel status) which was deemed to be a sufficient achievement for appointment to judicial office confirm this masculinist approach. The risk of masculinization is reflected in the gendered criteria and processes by which judges were traditionally appointed. The Lord Chancellor defined the criteria for appointment to judicial office as:

intellectual and analytical ability; sound judgment; decisiveness; and authority ... [l]egal knowledge and experience ... integrity; fairness; humanity; and courtesy.⁴⁰

As Kamlesh Bahl of the former Equal Opportunities Commission pointed out:

Given the predominance of men in the senior ranks of the judiciary, the bar and the solicitor's profession, there is an increased risk of stereotypical assumptions being made with regard to 'female' as opposed to 'male' qualities and aptitudes.⁴¹

Bahl referred to the risk with criteria such as 'decisiveness' and 'authority' that '[w]henver there is subjective judgment, sex bias can easily occur'.⁴² Conversely, a number of assumptions about women's feminine attributes tend to naturalize divisions of labour (such as women being better at Family Law, men at Criminal Law) that, in turn, influence appointment to judicial office. The historical lack of transparency in appointments to judicial office which flowed from the system of 'secret soundings' contributed to what was termed a 'cloning' tendency in judicial selection.⁴³

39 Though it should be noted that various types of masculinity exist; see, for example, R.W. Connell, *Masculinities* (1995).

40 Lord Irvine of Lairg, The Lord Chancellor, 'Speech to the 1998 Women Lawyer Conference', London, 25 April 1998.

41 'Judicial Appointments Procedures', Evidence to the Home Affairs Committee in *Minutes of Evidence and Appendices*, Third Report of Session 1995–96, HC 52-II, 211.

42 *id.* See, also: C. McGlynn, 'Judging Women Differently: Gender, the Judiciary and Reform' in *Feminist Perspectives on Public Law*, eds. S. Millns and N. Whitty (1999) 87–106; B. Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?' (2001) 1 *QUT Law and Justice J.* 223–40.

43 H. Kennedy, *Eve was Framed: Women and British Justice* (1992); See, also, Commission for Judicial Appointments, *Her Majesty's Commissioners for Judicial Appointments: Response to DCA Consultation Paper 'Increasing Diversity in the*

The judge, and the senior cohort of the Bar from which he was drawn, operates within a particular social field, whose routinized and internalized understandings – what Bourdieu termed the *habitus*⁴⁴ – replicate the masculinization of senior counsel and judicial office. According to these understandings the individual role of the barrister in court requires a certain bearing. It is no surprise that that ‘bearing’ tends to reflect masculine characteristics. When the Lord Chief Justice of Northern Ireland states that senior counsel, from whom the senior judiciary have historically been drawn, require ‘a presence, an authority’, does one imagine a woman or man?⁴⁵ One of the other male judges in the Northern Ireland survey stated that Silk required ‘a certain amount of gravitas’, a term that would typically be applied only to men.⁴⁶ The masculinization of the judge is also reinforced through performative adaptation of the voice which may require of women extraordinary modifications to timbre and pace. Dame Elizabeth Butler-Sloss, for instance, recalls, ‘I worked on that as much as I have worked on anything in order to get it deeper.’⁴⁷ The judge’s dress is another site for the gendered production of the judge and judicial authority. As Baroness Hale observes, ‘[n]ot surprisingly he dresses up in wig and gown to provide ... anonymity and that masculinity.’ The wearing of wigs particularly, she continued, ‘humanises us all into men. They deny us our femaleness let alone our femininity.’⁴⁸

In addition, the exclusion of women from the networks and socializing available to men, traditionally termed the ‘old boy’s network’, denied them access to the flows of information which were important in maintaining presence and authority. The exclusion of women from such flows may also represent a form of subordination, in that women are excluded from significant sources of informal knowledge.⁴⁹ Baroness Hale recalls how,

Judiciary’ (2005), and interview with Janet Tweedale, Department for Constitutional Affairs, London, 1 February 2005, regarding the informal system in England and Wales in which it was stated that there was some anecdotal evidence that judges did not appoint those ‘not like us’.

- 44 P. Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law J.* 805–53. For further discussion in the context of professional legal identity formation, see H. Sommerlad, ‘Researching and Theorizing the Processes of Professional Identity Formation’ (2007) 34 *J. of Law and Society* 190–217, and, with particular reference to gender, F.M. Kay and J. Hagan, ‘Raising the Bar: The Gender Stratification of Law-Firm Capital’ (1998) 63 *Am. Sociological Rev.* 728–43.

- 45 Interview, 15 February 2005.

- 46 Judicial Respondent V.

- 47 E. Cruikshank, *Women in the Law: Strategic Career Management* (2003) at 91.

- 48 Hale, op. cit., n. 14, at p. 497. See a similar argument about the eradication of individual (female) identity in S.L. Berns, *To Speak as a Judge: Difference, Voice and Power* (1990). From 1 October 2008 the wig is no longer required of many judges, under new rules on court dress; see, F. Gibb, ‘Model Judge and his Funky New Gown’ *Times*, 13 May 2008, 3.

- 49 D. Feenan, ‘Understanding Disadvantage Partly through an Epistemology of Ignorance’ (2007) 16 *Social & Legal Studies* 509–32.

when first on circuit the male judges asked her to leave the room following dinner, so that they could talk among themselves.⁵⁰

A number of scholars have identified how the judge and judicial authority is gendered. Rackley, starting first with her adoption of the fairytales of the Little Mermaid and the Emperor with no Clothes, illustrated the powerful myth of the judge as male.⁵¹ This view is echoed by Baroness Hale who notes that the ideal of the judge as anonymous, dehumanized, impartial, and authoritative is 'intrinsically male'.⁵² She continues: 'We have to challenge the notion that the only person who can be taken seriously as a neutral and fair-minded person is the judicial equivalent of a tall man in a suit'.⁵³ The male judge becomes synonymous with what Thornton terms the 'authoritative knower'.⁵⁴ Women are 'other' to the image of judicial authority.⁵⁵ This phenomenon of exclusion from the concept of the 'authoritative knower' is not limited to law. The othering of women as suitable for particular authoritative professional roles has been documented in relation to other professional careers such as architecture,⁵⁶ medicine,⁵⁷ and investment banking.⁵⁸ As McDowell observes, 'the very notion of authority is associated with masculinity'.⁵⁹ As authority tends also to signify power,⁶⁰ it cross-cuts with other markers of power such as class, sexual orientation, religion, and race.⁶¹

50 Hale, op. cit., n. 14, at fn. 20.

51 E. Rackley, 'Representation of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22 *Legal Studies* 602–24.

52 Hale, op. cit., n. 14; See, also, B. Hale, 'The Appointment and Removal of Judges: Independence and Diversity', speech to the International Association of Women Judges, 8th Biennial Conference, 3–7 May 2006, Sydney, Australia.

53 B. Hale, 'Making a Difference? Why We Need a More Diverse Judiciary' (2005) 56 *Northern Ireland Legal Q.* 281–92.

54 M. Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996).

55 Berns, op. cit., n. 48; S.L. Berns and P. Baron, 'Bloody Bones: A Legal Ghost Story and Entertainment in Two Voices – To Speak as a Judge' (1994) 2 *Aus. Feminist Law J.* 125–49.

56 B. Fowler and F. Wilson, 'Women Architects and their Discontents' (2004) 38 *Sociology* 101–19; A. Saint, *The Image of the Architect* (1983).

57 R. Pringle, *Sex and Medicine: Gender, Power and Authority in the Medical Profession* (1998).

58 L. McDowell, *Capital Culture: Gender at Work in the City* (1997).

59 id., p. 151. The association of authority with men, has been identified by other scholars, including M. Thornton, "'Otherness" on the Bench: How Merit is Gendered' (2007) 29 *Sydney Law Rev.* 391–413; K.B. Jones, 'On Authority: Or, Why Women are not Entitled to Speak' in *Authority Revisited*, eds. J.R. Pennock and J.W. Chapman (1987) 152–68.

60 L. Morley, 'Hidden Transcripts: The Micropolitics of Gender in Commonwealth Universities' (2006) 29 *Women's Studies International Forum* 543–51: 'The valuing and evaluation of knowledge, ability, expertise and competence are central to the workings and transmission of power' (p. 546).

61 C. Wright, S. Thompson, and Y. Channet, 'Out of Place: Black Women Academics in British Universities' (2007) 16 *Women's History Rev.* 145–162, who state that Black women in academia have been excluded from the imagined embodiment of positions of authority.

The extent of women's exclusion from appellate levels of judicial office may reflect the fact that it is at such levels that 'binding', authoritative law is considered to be produced.⁶² Those who produce law in these sites have particular authority within the judicial system. The image or concept of the proper judge at these levels becomes potent. Male judges have acted as gatekeepers to senior judicial office, or 'the Bench'. One of the female respondents in the current study, said:

The Bench ... are happier to appoint women to what they would regard as periphery judicial posts ... which they can pooh-pooh as 'well it's not really law, not really' ... That was the attitude of the previous two Chief Justices: 'Of course those women are all very well but we have to keep them in their proper place, and certainly not on the Bench.'⁶³

The argument that men judges may need to make room for women judges has been fought partly on the apparently neutral grounds of appointment on 'merit' and preserving judicial 'impartiality'. Former Justice L'Heureux-Dubé of the Supreme Court of Canada noted in 1997:

Women judges and adjudicators are finding themselves the targets of unfairly harsh criticism and allegations of bias, particularly – but not exclusively – when they have relied on a new perspective or more inclusive principles.⁶⁴

Former Justice Wilson, also of the Supreme Court of Canada, was criticized 'for playing politics, and not being impartial' for suggesting that women might bring alternative perspectives to judging.⁶⁵ The arguments based on neutrality require assessment against the content of the concepts of 'impartiality' or 'bias' (which reflect their own presuppositions and which can change over time).⁶⁶ Bias is well-documented in judgments,⁶⁷ and is, it has been argued, certainly from feminist perspectives on the male biases of law, to be characteristic within judging.⁶⁸ The myth of neutrality is one which has served to veil and protect the maleness of the judiciary. Where there has been any suggestion that women might bring a different approach, this has exacerbated male backlash. Following the announcement of Hale LJ's appointment to the House of Lords in 2003, she was criticized for her views, in what was deemed 'a textbook case of sexist journalism and the

62 R. Graycar, 'The Gender of Judgments: An Introduction' in *Public and Private: Feminist Legal Debate*, ed. M. Thornton (1995) 262–82, at 262.

63 Respondent H.

64 C. L'Heureux-Dubé, 'Making A Difference: The Pursuit of a Compassionate Justice' (1997) 31 *University of British Columbia Law Rev.* 1–15, at 7.

65 This was the position of REAL (Realistic, Equal, Active for Life) Women as outlined in a letter to the editor, 'Bertha Wilson pro-feminist anti-family' *Toronto Star*, 24 February 1990, D3.

66 Pannick, *op. cit.*, n. 18.

67 H. Cecil, *The English Judge* (1970).

68 R. Graycar and J. Morgan, *The Hidden Gender of Law* (2002, 2nd edn.); M. Omatsu, 'The Fiction of Judicial Impartiality' in *Feminism, Law, Inclusion: Intersectionality in Action*, eds. G. MacDonald, R.L. Osborne, and C.C. Smith (2005) 70–88.

differential treatment [of] women candidates for public office'.⁶⁹ The depiction of such eminent jurists as ill-suited to such judicial office serves to reinforce the perception of the woman judge as a threat to the order of law, drawing upon, as Thornton points out, the historical tropes of the feminine as disorderly or dangerous.⁷⁰

The need, first, to redress the historical failure of law to take account sufficiently of the views of women – some more than others – and, secondly, to enhance the general rationale for more women – and indeed other under-represented groups – in judicial office, with reference to the need for their voices to be 'respected and given authority',⁷¹ underpins this article. It is pertinent, therefore, to now turn to the survey.

RESEARCH FROM NORTHERN IRELAND

The research was conducted for the statutorily appointed independent office of the Commissioner for Judicial Appointments for Northern Ireland to examine the low representation of applications by women for Silk and judicial office in Northern Ireland.⁷²

1. *Context*

While women make up 51 per cent of the population of Northern Ireland,⁷³ up to the end of the research in March 2005 women held 18 per cent of judicial posts above tribunal level. There are still no female High Court, or Court of Appeal, judges.⁷⁴ The number of women holding high legal office in Northern Ireland is low compared to other countries. At the time of the research, 8 per cent of the total number of High Court Judges in England and Wales were women (though the number has increased since then, particularly at the District Judge level).⁷⁵ Female representation in Northern Ireland compared to some other overseas jurisdictions at that time was even

69 S.J. Kenney, 'Britain Appoints First Woman Law Lord' (2004) 87(4) *Judicature* 189–190, at 190.

70 Thornton, op. cit., n. 36.

71 Graycar, op. cit., n. 62, at p. 281.

72 For background to the research, see D. Feenan, *Applications by Women for Silk and Judicial Office in Northern Ireland* (2005) 9–11.

73 Gender Equality Unit, Office of the First Minister and Deputy First Minister, Northern Ireland, *Gender Matters: A Consultation Document* (2004), Annex 3.

74 No current data on gender representation in judicial office in Northern Ireland was available in the public domain prior to acceptance of this article. Such data was later published, with new findings on propensity to apply to judicial office, on 24 October 2008, at <<http://www.nijac.org/publications/research.htm>>.

75 For current data, see 'Table: Judiciary of England and Wales Statistics – Women Judges in Post', <<http://www.judiciary.gov.uk/keyfacts/statistics/women.htm>>.

worse. In Canada, 26 per cent of the federal judiciary were women, with one-third of judges at provincial level. In Finland, where, in general, entry to judicial office is based in part on achievement of a Master's degree in law, 46 per cent of judges were women. In France, which has career judges, more than 54 per cent of the judiciary were women.

2. Methodology

The research was conducted between 23 September 2004 and 28 February 2005. Questionnaires and optional follow-up semi-structured interviews were used with a probability sample of 45 female holders of judicial posts, representing 27 per cent of the total number (166) of female holders of judicial office, including tribunal posts, in Northern Ireland.

The questionnaires asked a series of closed questions to obtain statistical data (such as age, professional background, and caring responsibilities) and, then, open questions in order to determine respondents' views on representation of women in Silk and judicial office. Two questions were directed to those from a solicitors' background: first, date of appointment as partner/associate/assistant, and, secondly, the size of practice. All respondents were asked to indicate main field/level of work before being appointed to judicial office, and the date appointed to judicial office(s). Respondents were also asked whether barristers and, separately, solicitors were under-represented in applications for judicial office and, if so, what could be done to encourage more women to apply.

The response rate for the questionnaire to female holders of judicial office was 44 per cent (20) (of which two replied anonymously). The majority (13) were solicitors by professional background. Of the total who responded, 70 per cent (14) indicated willingness to be interviewed, of whom thirteen were interviewed. One further interviewee had received a questionnaire as a solicitor, but as a tribunal member was interviewed as a holder of judicial office. An additional four, who had not returned questionnaires, nonetheless took up the offer in the questionnaire to be interviewed. In total, eighteen women judges were interviewed (representing 40 per cent of the sample population). Most interviews were conducted in the respondents' offices or chambers, with three interviews conducted, respectively, at a respondent's home, a nearby restaurant, and at the author's office. The bulk of interviews were conducted by the author, with the remainder conducted by two trained research assistants.

The interviews comprised 22 main open questions intended to draw out some answers given in the questionnaire and to explore new issues. The range of questions included: what motivated a woman to apply for judicial office; knowledge of women leaving legal practice for reasons associated with their gender; the fields of work/level of court perceived as important in appointments; briefing practices; work/life balance; informal networks; confidence in applying; confidence in challenging gender inequality;

experience of gender discrimination; recommendations; perception of any difference that greater female representation would bring, and culture of the judiciary with reference to gender. A letter requesting a personal interview was sent to each of existing automatic consultees in the process of appointment to Silk in order to explore broader issues in relation to gender and appointment to Silk and judicial office. This led to interviews with six male judges, including the Lord Chief Justice of Northern Ireland, and allowed some comparison with the responses from the female holders of judicial office.

Some caution needs to be exercised in interpreting the data. The responses may not be generalizable. The response rate is low. There may have been an element of self-selection among those who responded and made themselves available for interview. Moreover, given that respondents were notified that the purpose of the research was to determine whether recommendations for reform of the appointments process were necessary, there may have been, unsurprisingly, an element of self-interest among some respondents. The survey's focus on gender meant that other issues, such as ethnicity, class,⁷⁶ religion, and sexual orientation⁷⁷ were not explored unless mentioned by respondents. Nonetheless, the concordance of views with reference to gender across a significant number of respondents suggests inferential value in the responses which are deployed here to suggest tentatively reconsideration of broader issues not easily measured by standard survey methods.⁷⁸ A number of themed responses to these questions are presented here. The first, supporting the thesis of the judge as male, shows how the culture of the judiciary is perceived overwhelmingly by women judges to be male.

3. Perceptions about the culture of the judiciary

First, respondents were asked to describe the culture of the judiciary with reference to gender. The preponderant view among women judges was that the

76 Two women judges referred to socio-economic status. One said:

I think a most valuable asset is common sense and experience of ordinary life ... I don't think it operates as much now ... but a lot of the magistrates and certainly the people in higher judicial office belonged to a kind of elite. They were, at the very worst, middle-class people who had very little experience of what ordinary people's lives were like (Respondent C).

Another woman judge said, touching on the public's perception of the judge:

How will they understand? being driven home at night in their big, fancy car to their big fancy house? How do they understand what it is like to try and make ends meet on social security payments? (Respondent A).

The judiciary in Northern Ireland has far fewer members drawn from public (fee-paying) schools, and the elite Oxbridge backgrounds than the judiciary of England and Wales.

77 For discussion, see, for example, L.J. Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney Law Rev.* 565–98.

78 A. Bryman, *Social Research Methods* (2004, 2nd edn.).

culture was male. But many believed it to be changing. Only one female judge stated that she was not aware of any particular culture, another that she was not really close enough to it to be able to comment by virtue of being on a tribunal. Significantly, none of the male judges considered that there was a culture with reference to gender. This was reflected in the views of one woman judge who said '[i]t's individuals that make up the group. Some individuals are better than others at seeing gender issues.'⁷⁹ Five women judges described the culture with reference to gender as: 'ultra-conservative',⁸⁰ 'still very male-orientated in its attitudes',⁸¹ 'male-orientated',⁸² 'still very much an old boy's network',⁸³ and 'atonalistic and patronising'.⁸⁴ Some referred to the fact that the judiciary was changing. It is perhaps of little surprise that one female holder of judicial office in Northern Ireland stated of the system of judicial appointment prior to the reforms enacted by the Justice (Northern Ireland) Act 2004:

most of the people appointing tended to be male and I think they found it quite difficult to look at women in the same way that they look at male colleagues ... I think there was very much a feeling in legal circles that it was a man's profession rather than a woman's profession.⁸⁵

The culture was perceived to be more male higher up the judiciary, as another woman judge in a lower court noted: 'At my level, which is a lower level, I think it is fine, but the perception for a judicial posting from Magistrates upwards is that it's still male dominated'.⁸⁶ One woman judge added; 'I think they are trying to be fair, but I think by and large they don't realise how much of their thinking and working practices and assumptions actually are sexist.'⁸⁷ A number of these working practices and assumptions have served to exclude women from judicial office or undermine their authority as potential judges.

4. *Exclusion*

While it has already been noted how working practices and appointments procedures disadvantaged women, eight women judges in the Northern Ireland survey also expressed views that informal networks or socializing among men influenced appointments, and adversely affected women. One thought these 'very important', and noted:

79 Respondent D.

80 Respondent A.

81 Respondent O.

82 Respondent I.

83 Respondent B.

84 Respondent A.

85 Respondent O.

86 Respondent J.

87 Respondent N.

For example, golf clubs – membership of which is seen as prestigious in some way – almost exclusively male-oriented, affording opportunities to interact usefully within the profession ... Secret societies also play a part here and, in my view, if not banned altogether, membership should be compulsorily disclosed. Judges are not meant to have political affiliations. In my view it is equally repugnant for them to be members of secret societies such as the Masons or the Knights [of Saint Columbanus]⁸⁸ or Opus Dei ...⁸⁹

Several suggested that informal networking and socializing was used by women as well, but most noted that family responsibilities prevented women from interacting to the same extent as men:

I think that men are much more clubbable than women and, associated with the Bar, there are a lot of sporting organisations, things like the golfing society. I think there's rugby, football, cricket ... all of these things provide potential for bonding between men and also for mixing with men who are already Silks or judges. I think this is a problem for women. I am not saying that there aren't organisations which women belong to as well but they don't use them, I don't think, to network in the way that men do.⁹⁰

These views are consistent with findings in the Republic of Ireland where, while there are some structural differences in the legal profession compared to Northern Ireland, significant cultural homologies remain. In Ireland, for example, more women than men tend to feel excluded from social networks.⁹¹ Similar exclusion has been reported elsewhere.⁹² In Australia, Justice Catherine Branson noted that 'a significant problem does arise because, as women in our profession, we are made to feel that we are outsiders – not of the mainstream'.⁹³ This reflects what Thornton neatly terms the 'homosocial' norms that perpetuate male dominance over women.⁹⁴

These practices of exclusion are compounded by the discourses that tend to operate in physical spaces to which women are admitted. Branson talks of the 'war stories' told at law gatherings in which 'the agents of power and authority in them are universally men'. She continues:

Women, if they play a role at all in such stories, tend to be the unclad young practitioners surprised by a colleague in a senior counsel's chambers, or the client from the entertainment industry captivated by the sexual force of a senior counsel's measured control. Secondly, of their very nature, such stories can only be told by men.⁹⁵

88 A Roman Catholic fraternal organisation with charitable aims created in Ireland, involving secret ceremonials; details available at <<http://www.knightsofstcolumbanus.ie/home.php>>.

89 Respondent L.

90 Respondent I.

91 I. Bacik, C. Costello and E. Drew, *Gender InJustice* (2003).

92 Hale, *op. cit.*, n. 14, at fn. 20.

93 C. Branson, 'Running on the Edge', Address to Women Lawyer's Association of New South Wales, 15 October 1997.

94 Thornton, *op. cit.*, n. 54.

95 Branson, *op. cit.* n. 93.

Women are thereby denied authority through direct, or indirect, exclusion from such networks and through the constitution of who can participate in narrating what is important. These practices of exclusion, which may create a chill factor for women generally, should perhaps come as no surprise given the history of overt exclusion and discrimination towards women in the legal profession. It was not until the Sex Disqualification (Removal) Act 1919 that women in the United Kingdom were entitled to hold any civil or judicial office or post or to carry on any civil profession or vocation.⁹⁶ The expansion of university education from the 1970s accelerated the proportion of women entering the profession such that women now outnumber men graduating in law. Yet, even in jurisdictions where women have long been suitable for judicial appointment, they still face exclusion. For instance, former Justices L'Heureux-Dubé and Wilson felt 'isolated' and 'the sting of exclusion', respectively, on the Supreme Court of Canada.⁹⁷ Justice Catherine Branson of Australia recalls how women's exclusion from judging there is put almost beyond question when a male barrister says something along the following lines:

X's appointment to the Supreme Court, whilst most welcome, took us all by surprise: after all he is a male, heterosexual, came from the inner-bar and he knows something about the law having practiced it for many years.⁹⁸

Even in jurisdictions where women judges outnumber male judges, such as France, the legacy of male domination is evident in the second-class status of women judges.⁹⁹ This marginalization was identified by one of the female judges in the survey in Northern Ireland, quoted earlier, who spoke of appointment to peripheral posts.

The perception among the majority of women of their exclusion from networks or socializing, such as to affect adversely their advancement to judicial office, links with their experience of other forms of gender discrimination. This discrimination, based primarily on gender stereotypes, indicates how women were not treated as suitable for the position of the 'authoritative knower' which is imbricated within traditional understandings of the judge.

96 Though there are reports of women practitioners in the courts of medieval Scotland, and a reference in a seventeenth-century treatise about the legal profession of a women solicitor: M.J. Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (2006) at 116.

97 C. Backhouse, 'The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* Case' (2003) 15 *Cnd. J. of Women and the Law* 167–93.

98 Branson, *op. cit.*, n. 93.

99 A. Boigeol, 'Male Strategies in the Face of the Feminisation of a Profession: The Case of the French Judiciary' in Schultz and Shaw, *op. cit.*, n. 1, pp. 401–18.

5. Gender discrimination

Many respondents in the Northern Ireland survey reported overt discriminatory statements made by men mainly through the 1980s – when most of the respondents were entering the legal profession or were in the early years of practice. These statements were based on stereotypes of female lawyers, and appear to be part of a continuum of disadvantage that women continue to experience. One female judge recounted how in the early 1980s as a young lawyer working late one night, a colleague approached her and asked: ‘why aren’t you home making your husband’s dinner?’¹⁰⁰ The implicit confinement of women to the domestic sphere carries with it the associated exclusion from the public sphere. This echoes reports in Australia where a woman applicant for a judicial post was questioned on whether she had made arrangements for their children, and another applicant was criticized by senior counsel because she had children and a husband with a busy practice.¹⁰¹ Sandra Day O’Connor, the first female justice of the US Supreme Court, relates that following her appointment, she received a number of letters criticizing her appointment. One wrote: ‘Back to your kitchen and home female! This is a job for a man and only he can make the rough decisions. Take care of your grandchildren and husband.’¹⁰² Through this construction of the identity of the *woman* lawyer as carer/‘housewife’ the concept of judge implicitly becomes a quasi-masculine category of work. The confinement to the domestic sphere negates the possibility of women as authoritative knowers in law.

The Northern Irish judge, referred to above, recalled another instance in the early 1980s in which a male judge demeaned women barristers generally:

[T]here were two women in Court fighting a Family case and [the judge] said, ‘I thought when women came to the Bar the standard of advocacy in Family cases would improve and it hasn’t’.¹⁰³

The respondents recalled fewer references to overt sexist language since then, though one female judge recounted hearing of barristers refer to her within the last ten years as a ‘bitch’ in circumstances where, she stated, ‘a man in the same position would not have been classified in those terms’.¹⁰⁴ She also noted that at a Judicial Studies Board presentation about the difficulty of obtaining truth from children’s evidence, the previous Lord Chief Justice stated: ‘it would make one wonder about fantasising women’. The female judge added that ‘it was an unbelievable statement to come out with, bearing in mind it had nothing to do with the presentation and that was his opening.’

100 Respondent D.

101 M. Neave, ‘The Gender of Judging’ (1995) 2 *Psychiatry, Psychology and Law* 3–23.

102 S. Day O’Connor, *The Majesty of Law* (2003) at xv.

103 Respondent D.

104 Respondent A.

While the reported incidence of overt stereotyping appears to have declined through the 1980s, women continued thereafter to be disadvantaged in the path to judicial appointment. These disadvantages included: briefing practices between solicitors and barristers which occasionally excluded women; the tendency to exclude women from certain fields of work, such as criminal law; over-reliance on visibility in the High Court; and, criteria that would be commonly understood to cover men and not women.¹⁰⁵

Gender stereotyping explained a number of these disadvantages; for instance, the difficulty for some in obtaining briefs in cases traditionally perceived to be male domains. One woman judge said: 'there's definitely a perception that the Criminal side is tough if you are down in the cells etc. It's tougher for women to make their mark in that respect.'¹⁰⁶ Another said: 'not every woman at the Bar is suited to being a Criminal lawyer because I think there are particular types of attributes Criminal defence lawyers have ...'.¹⁰⁷ Another respondent stated that there remained a problem with gender stereotypes at middle management in the Courts Service: 'Sometimes how people are treated in judicial office can be off-putting for future applicants'. She added:

I'd be asked if I would pour coffee and that type of thing. Once I was trying to improve accommodation within my court and I was visited by a member of middle management who embarked on a discussion with me which just wasn't acceptable and really was in the type of terms that he would have addressed his wife if she had overspent the housekeeping money ... there are a few dinosaurs in there in their mid-fifties who really just find the concept of female members of the judiciary very odd.¹⁰⁸

While such instances of sexist language are less common today, the legacy of such views remains potent in part due to the fact that the judges in the higher courts are drawn from that generation of lawyers. The legal profession has also steadfastly resisted attempts to engage in anything approaching the commitment to examining gender bias that characterized initiatives in the United States and Canada in the 1980s and 1990s. It should be no surprise, therefore, that women judges in Northern Ireland continued to experience discrimination into the millennium. The undermining nature of these comments further reinforces the exclusion of the woman as judge. This is compounded by the lack of faith of many female holders of judicial office in the mechanisms of accountability for addressing gender discrimination. In general, they would not raise complaints for fear of victimization, and consequent harm to their career. One woman who believed that she may have experienced gender discrimination put it as follows:

105 For full details, see Feenan, *op. cit.*, n. 72.

106 Respondent G.

107 Respondent D.

108 Respondent M.

Well I wouldn't have felt confident about raising it. I don't think raising it would have done any good. And the reason I say that is in the areas where I've seen women raise these issues for example ... [D]o you remember there was a policewoman, a senior policewoman, who raised the issue that she had been overlooked? But she was destroyed. She was completely trashed and destroyed. And I just think that if you raise these things you are not going to be a popular person, everybody knows that, and you'll be out outside like some lunatic.¹⁰⁹

Another added:

[e]ven at my relatively senior level, women are inhibited from challenging – for fear of adverse reaction/labelling ... Again, the problem is in the profession rather than in the application system. The resultant disparity of numbers of female Silks or judges is directly attributable to the endemic discrimination in the profession.¹¹⁰

Yet another stated that 'you will have a mark against you for any other judicial posts that you might look at'.¹¹¹ One other added: 'in circumstances where a male may be regarded as applying his rights, a female would be regarded as a troublemaker.'¹¹²

Women judges had very low levels of confidence in the ability of the professional bodies¹¹³ to address a complaint effectively – which can lead those similarly placed to doubt the safety and possible benefits of doing likewise.¹¹⁴ Of the four women qualified as barristers who offered a rating of such confidence on a scale of 1 to 10, the average rating was 3.5 (with values of 2, 3, 4, 5). One woman judge added: 'I don't think I would have ever relied on them.'¹¹⁵ Another female judicial noted that there was no Women's Bar Association in Northern Ireland, and observed: 'given that they don't feel free to congregate together and band together in that I can't imagine any of them feeling free to put their head above the parapet.'¹¹⁶ Another stated, '[t]hey have, in theory, got a Committee which deals with these matters but I think my suspicion is that it might be window-dressing really and is tolerated by the male members of the Bar really to keep the females quiet.'¹¹⁷ Of the five women qualified as solicitors who offered a rating, the average rating was 4.9 (with values of 3, 4, 4, 4.5, 9).¹¹⁸

109 Respondent D.

110 Respondent L.

111 Respondent H.

112 Respondent I.

113 For solicitors, the Law Society of Northern Ireland and, for barristers, the Bar Council of Northern Ireland.

114 P. Thomas, 'Introduction' in P. Thomas (ed.), *Discriminating Lawyers* (2000) xi–xviii.

115 Respondent D.

116 Respondent A.

117 Respondent O.

118 An overall rating was lifted by one rating of 9 from a female judge who believed that as she was now in judicial office 'I wouldn't necessarily see it impacting on future employment prospects of myself' (Respondent J). Removing this outlier brings the rating by solicitors within 0.38 of the average rating by barristers.

The experience of discrimination by women judges, both formerly as lawyers and as judges, is consistent with survey results from some other jurisdictions. A survey in 2001 of members of the Association of Women Solicitors in England and Wales reported that 32 per cent said they had experienced sex discrimination at work.¹¹⁹ Martin found that 81 per cent of women judges in the United States had experienced some form of sex discrimination.¹²⁰

The combined effect of the exclusion, discrimination, and undermining of women's confidence in complaint tends to undermine her ability to be treated as a judge. Baroness Hale suggests an alternative, one which disrupts the assumed neutrality of the authoritative male judge:

We have to reflect ourselves in the way that we speak. I speak, as I said in a recent opinion, as a 'reasonable but comparatively weak and fearful grandmother' with as much right to be heard as the stronger and braver grandfathers around me.¹²¹

This is signally important, not only in terms of recognizing that judges have a particular voice but by conveying honestly a self-deprecating assessment of a personal voice – one which marks out some difference from the normative assumptions about judging. What difference, if any, would more women in judicial office make? The Northern Ireland survey throws some light on this issue.

CONSIDERING DIFFERENCE

Three of the 18 female respondents believed that having more women in judicial office would make no difference. The majority of the female interviewees indicated that women judges would, in various ways, make a difference – though not all to the process or outcome of judging. Their responses can be categorized as relating to: (a) reflecting the gender ratio of society generally, (b) enhancing public confidence, (c) changing the working environment, (d) role-modelling for women, and (e) bringing different approaches to judicial office than those brought by men. Some of these were combined, as the following statement illustrates:

119 V. MacCallum, 'Women tell of sex bias' *Law Society's Gazette*, 13 July 2001. <<http://www.lawgazette.co.uk/news/general/view=newsarticle.law?GAZETTENEWSID=30114>>. See, for the Bar: TMS Management Consultants, *Without Prejudice: Sex Equality at the Bar and in the Judiciary* (1992).

120 E. Martin, 'Men and Women on the Bench: Vive La Difference?' (1990) 73 *Judicature* 204–7. See, also, the Gender Bias Taskforces in the United States in the 1980s and 1990s, reviewed in J. Resnik, 'Asking About Gender in Courts' (1996) 21 *Signs* 952–90.

121 Hale, *op. cit.*, n. 53, at p. 288.

I think it reflects, obviously, the balance in society. So ... to the extent ... from the public's perception ... I think it goes towards making it more representative. I think women do bring different aspects and skills and different life experiences to men, and that means that they will look at situations in a different way – which has merit. The more you get the opportunity to have different views and experiences brought to the Bench can only help in formulating good decisions.¹²²

The most prevalent view, among four respondents, was that more women would make judicial office more representative. One judge said: 'I think that in all walks of life there should be an equal balance between the representation between men and women and I don't think the Court should be any different.'¹²³ As has been noted earlier, much of the official rationale for more women in judicial office has been in such terms of equality or fair representation. Ancillary rationales are reflected in other responses from the female respondents in this research. Two respondents believed that more women would enhance public confidence in the judiciary. One stated, for instance, 'I think more people in society ... would place more confidence in us.'¹²⁴ One respondent also believed that an increase in women would enhance confidence among potential women applicants for judicial posts.¹²⁵

Other respondents added that greater numbers of women would change the working environment. One stated that it would make a difference to the 'atmosphere in the back corridor' at the Royal Courts of Justice where all the (male) judges of the Supreme Court of Judicature have chambers.¹²⁶ Another woman judge referred to the effect of change on the 'boys' network, boys' club'.¹²⁷ Such views are consistent with the views expressed by women judges in a number of other jurisdictions. In the state of Victoria in Australia, women were credited with contributing to working conditions in which there was more informal contact and support for colleagues.¹²⁸

There were, in addition, a variety of responses from five respondents along the lines that women judges would bring different approaches to judging. These responses ranged from that of the judge who thought that women saw things from a different angle to those of judges who believed that women judges helped draw out people. The latter view is illustrated by one member of a tribunal who said:

It would bring in a different dimension I think. You don't apply the law any differently. But I do think you see things from a different angle ... I think we could probably draw people out better in some ways. Certainly, it comes down

122 Respondent G.

123 Respondent P.

124 Respondent A.

125 Respondent M.

126 Respondent P.

127 Respondent A.

128 K. Laster and R. Douglas, 'Feminized Justice: The Impact of Women Decision Makers in the Lower Courts in Australia' (1995) 12 *Justice Q.* 177–205.

to quite a lot of hard work trying to find out how people's feelings were injured or hurt if they have been discriminated against. I think sometimes we can get the better out of people than men can.¹²⁹

This echoes a view about the late Dame Rose Heilbron, of whom it was said when she was a King's Counsel that '[s]he defends a person more than a set of facts. I think it shows that she is a woman.'¹³⁰ A similar view was attributed to the first woman judge in California, Georgia Bullock, who observed that: 'To a man judge [a female defendant] is likely to be just another case. To a woman judge she is a problem that needs to be solved.'¹³¹ For Bullock, the subject before the court was a person facing a legal problem. For the male judge, it was a defendant. Another female holder of judicial office in the survey in Northern Ireland said:

I think it's very definitely simple the difference it would make, and I quote Mary Robinson, the [former] President of Ireland, 'women bring humanity to our job', and I think it means that people, it doesn't matter who they are, men or women, come before the bench and I think, generally, see a more human face ... most of them, generally, I think, feel that they have had ... maybe ... a better hearing.¹³²

Two other respondents believed that where women had experience of bringing up children this would make a difference to judging (though the conservative assumption that women are necessarily parents is striking). One judge said:

I do think there's no doubt that women bring different qualities to different things ... you do have to take time off to have a child and bring a child up and so on ... do the doctors' appointments and the dental appointments ... and they obviously have a greater understanding of the needs and demands and so on. I think you must have that representation.¹³³

This echoes the views of Hale about the potential influence of parenting on judging:

I would like to think that a wider experience of the world is helpful: knowing a little about bearing and bringing up children must make some difference ... [although] there have been wonderful family judges who have never changed a nappy or cooked a fish finger in their lives.¹³⁴

One other judge in Northern Ireland who referred to parenting did so in the context of multi-tasking and lateral thinking:

... women multi-task from birth. We have to. We can change a nappy and see that the spuds aren't burnt dry, all at the same time ... We can stop baking to

129 Respondent H.

130 Obituaries, 'Dame Rose Heilbron' *Guardian*, 13 December 2005, at 32.

131 Quoted in B.B. Cook, 'Moral Authority and Gender Difference: Georgia Bullock and the Los Angeles Women's Court' (1993) 77 *Judicature* 144-55, at 149.

132 Respondent A.

133 Respondent B.

134 Hale, *op. cit.*, n. 14, at p. 501.

pick up a broken china vase before a child falls on it. We can multi-task, and ... because we think laterally we don't just focus in linearly on what's immediately in front of us.¹³⁵

The same respondent referred to a shift from linearity to context as a distinguishing feature of the female judge:

We don't take things out of context ... because we can think laterally we don't just focus in on the immediate issue, we can look and see 'how does this fit with ... into context with'.¹³⁶

She added: 'even in sentencing in a Criminal Court we must have regard to things like the person's background'. The possible impact on sentencing was identified by another respondent, though, this time, based on what were seen to be the different experiences of services that women have. She stated:

I think you would probably find that sentencing would go up dramatically, there's all kinds of child abuse, sex crimes, there's absolutely no doubt about it they have an entirely different attitude to it. I think they would be more responsive to the needs of the client or customer. They would see it as delivering a service because a lot of them have been on the receiving end of the health service and other kinds of service systems and they would be more likely to see what time we are doing this at, it does not fit in with what people have to do.¹³⁷

Finally, there were two additional themes identified by judges. One judge added that 'women are less likely to be taken-in by other women than men are'.¹³⁸ Another stated, '[i]t would bring a difference, I think. You don't apply the law any differently, but I do think you see things from a different angle'.¹³⁹

The women judges also offered a range of attributes that go beyond those currently expected of applicants. These additional attributes are: empathy, respect for other people, patience, ability to recognize equality issues, and being able to communicate well with members of the public and with colleagues in the profession. One other judge added: '[c]ontinuing contact with the community, being a part of the community and being aware of what's going on in the community'.¹⁴⁰ What may be said of these findings?

DISCUSSION

While a minority (five) of the women in the survey *explicitly* referred to the fact that women make any difference to judging, it might be inferred that

135 Respondent A.

136 Respondent A.

137 Respondent N.

138 Respondent C.

139 Respondent H.

140 Respondent K.

those women judges who identified different attributes from male judges were also alluding to distinctive ways of judging. The minority view among women judges surveyed here is certainly less pronounced than in the United States, where Martin found that the majority of women judges believed that women will approach judging differently to men.¹⁴¹ The low number of women in Northern Ireland sharing this view could suggest that the majority reject gender as relevant to the process or outcome of decision-making. This might also reflect the conservative nature of the legal profession in Northern Ireland, where there has been 'little in the way of activist, let alone radical lawyering.'¹⁴² This extends to the professional bodies, the Law Society of Northern Ireland and the Bar Council of Northern Ireland.¹⁴³ This has partly been a consequence of traditional nature of legal education at universities in Northern Ireland, from which the majority of the judiciary is drawn. Legal education has not, until recently, included modules on gender and the law. The tendency for many law schools to produce in their students an identity that conforms to the norms of the profession is well-documented in the United Kingdom¹⁴⁴ and elsewhere,¹⁴⁵ as is the conservatizing influence of the legal profession generally on many who subsequently go into practice.¹⁴⁶

Moreover in Northern Ireland, until the review in 2000 of criminal justice,¹⁴⁷ which included the courts, the judiciary had, compared to other institutions of governance such as policing, largely escaped thoroughgoing mechanisms of review and accountability. It would also appear that in the absence of a long-standing representative body for women judges, non-members are less likely to perceive that women will approach judging differently from men. Few female holders of judicial office in Northern Ireland are members of the International Association of Women Judges.

141 E. Martin, 'The Representative Role of Women Judges' (1993) 77(3) *Judicature* 166–73.

142 S. Livingstone, 'And Justice for All? The Judiciary and the Legal Profession in Transition' in *Human Rights, Equality and Democratic Renewal in Northern Ireland*, ed. C. Harvey (2001) 131–62, at 133; see, also, K. McEvoy and R. Rebouche, 'Mobilizing the Professions: Lawyers, Politics, and the Collective Legal Conscience' in *Judges, Transition, and Human Rights*, eds. J. Morison, K. McEvoy, and G. Anthony (2007) 275–314, at 275.

143 *id.*

144 For example, R. Collier, 'Peter's Choice: Changing Representations of Lawyers and Legal Academics – Work, Identity and Lifestyle in the New Economy' in S. Greenfield and G. Osborn (eds.) *Readings in Law and Popular Culture* (2006) 31–64.

145 For the United States, see D.J. Schleef, *Managing Elites: Professional Socialization in Law and Business Schools* (2006).

146 Albeit less so in the United Kingdom than in the United States: see, for instance, A. Boon, 'From Public Service to Service Industry: The Impact of Socialisation and Work on the Motivation and Values of Lawyers' (2005) 12 *International J. of the Legal Profession* 193–224, and Sommerlad, *op. cit.*, n. 44.

147 Criminal Justice Review, *Review of the Criminal Justice System in Northern Ireland* (2000).

There is no association of women barristers, and an association of women solicitors is virtually moribund. In the absence of any collective professional identity, it becomes more difficult to raise consciousness about collective oppression. Martin found in the United States of America that women judges who were not members of the National Association of Women Judges were less likely than those women who were members to agree with the following statements: that women have certain unique perspectives different from those of men that ought to be represented on the bench; that women judges are probably more sensitive to claimants raising issues of sexual discrimination than are men, and; that women judges have an ability in the decision-making process to bring people together in a way that men don't.¹⁴⁸

The conservatism among respondents in Northern Ireland may also be explained in part by the distinctive organizational structure of the legal profession there, which facilitates homogeneity in outlook. Practising barristers become members of the Bar Library, which occupies a single building in Belfast, unlike the chambers system in England and Wales.¹⁴⁹ In the latter, barristers are dispersed in independent offices throughout the country.¹⁵⁰ English lawyers may occupy practices with distinct micro-organizational cultures, specializing, for example, in progressive human rights litigation or more traditional property work for high-net-worth clients. Most barristers and solicitors in Northern Ireland have been educated in Northern Ireland through to professional practice, absorbing a narrower range of experiences than that of lawyers in England and Wales. Widening of higher education in the 1990s means that proportionately fewer graduates are middle-class, but, as Fox and Morison pointed out some fifteen years ago, the racial and cultural background of lawyers is markedly homogenous.¹⁵¹ The solicitors' profession comprises mainly small firms, which have little exposure to the range of influences experienced by the large, multi-national firms in England. A number of respondents in the present study explained the conservatism, including gender conservatism, with reference to the small size of the profession. 'Everybody ... knows everybody else', said one.¹⁵²

Holders of judicial office are drawn almost exclusively from the ranks of barristers and solicitors in Northern Ireland, with some posts requiring at least ten years standing as a member of the Bar of Northern Ireland or as a solicitor of the Supreme Court, thus reflecting the characteristics of the

148 Martin, *op. cit.*, n. 141.

149 For a brief description of the legal profession in Northern Ireland, see B. Dickson, *The Legal System in Northern Ireland* (2005, 5th edn.).

150 J. Morison and P. Leith, *The Barrister's World and the Nature of Law* (1992). For a more detailed, though now, necessarily, more dated, account, see R. Abel, *The Legal Profession in England and Wales* (1988).

151 M. Fox and J. Morison, 'Lawyers in a Divided Society: Legal Culture and Legal Services in Northern Ireland' (1992) 19 *J. of Law and Society* 124-45.

152 Respondent F.

profession. Historically, the senior judicial posts were occupied predominantly by Oxbridge-educated Protestants from unionist backgrounds.¹⁵³ In part, the low representation of Catholics reflected unionist/Protestant domination within the new jurisdiction, but it was also a consequence of the decision of most Catholics, who were predominantly nationalist, to eschew careers in public office.¹⁵⁴ Moreover, the recent period of violent political conflict in Northern Ireland may have deterred some from applying. Judges were listed as legitimate targets by Republican paramilitary organizations. A number of judges and lawyers were murdered for political reasons.

There is little evidence, therefore, that women judges in Northern Ireland suggest *radically* different approaches in answer to the question of whether more women on the bench will make any difference. This may also reflect a fear that as historical outsiders, any difference will not be tolerated. Subordinated groups are often occupationally socialized to think in this way, with evidence of assimilation to the gender norms of the legal profession.¹⁵⁵ Certainly in other jurisdictions where women were beginning to make an appearance, few willingly marked out difference. As American judge Patricia Wald noted in the early 1990s, when women were a small minority of judges:

For now, the judiciary is still a newly integrated male club, and women judges are expected to be agreeable, charming, bright, incisive, non-threatening, loyal, not irritatingly individualistic, supportive, cheerful, attractive, maybe witty – to a point, but not pushy, insistent, aggressive, sarcastic, unyielding or any of the other qualities our male colleagues exhibit every day.¹⁵⁶

Similarly, in Australia, Justice Mary Gaudron noted that:

To be different, to challenge the codes of conduct derived, as often as not, from rules developed on the playing fields of Eton for male members of the aristocracy, would have been to invite ostracism, perhaps, even, the attention of the Ethics committee; to assert that women were different with different needs would have been construed as an acknowledgment of incompetence; to question the bias of the law would have been to invite judgment as to one's fitness to become a member of the profession. And, thus, very many of us became honorary men.¹⁵⁷

Legal, political, and social factors will influence different consciousness about gender and judging in different ways. Canada, for example, has a longer, though still recent, experience of gender diversity. The first national conference on the relationship between judicial neutrality and gender was in

153 P. Hillyard, 'Political and Social Dimensions of Emergency Law in Northern Ireland' in *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland*, ed. A. Jennings (1988) 191–212.

154 J. McGarry and B. O'Leary, *Explaining Northern Ireland* (1995).

155 Kennedy, *op. cit.*, n. 43; Canadian Bar Association, *op. cit.*, n. 30.

156 P.M. Wald, 'Some Real-Life Observations about Judging' (1992) 26 *Indiana Law Rev.* 173–86.

157 M. Gaudron, 'Speech to Launch Australian Women Lawyers', 19 September 1997, <http://www.hcourt.gov.au/speeches/gaudronj/gaudronj_wlasp.htm>.

1986. The first gender bias task force in the United States was in 1982.¹⁵⁸ The challenges faced by women in societies undergoing significant cultural or political change, can have substantial impact on shaping awareness and ability to speak out, as vividly illustrated in Shirin Ebadi's account of life as a judge through the Iranian Revolution.¹⁵⁹

While the majority of women judges in Northern Ireland eschew the idea that women will reach a different decision, a significant proportion nonetheless suggest that they may see the parties and issues differently. It is noteworthy that the responses among the male judges were more limited in range, though echoing some of the points made by women judges in relation to changing the environment and difference of perspective. Two of the male judges suggested differences. The Lord Chief Justice stated:

[t]hey comprise half of the population after all ... they are bound to bring a side to the job that's different ... [W]omen have a different insight. There is no question about that, and I would welcome from time to time the contribution of women that they can convey to the Court of Appeal. I have just finished a case in which I would have liked to have had the comments of a woman on the case.

The other stated, more diffidently:

Only women will know what the impact is on a woman, and perhaps I will never know. Although I have women in my life – a wife, daughters, and of course my mother – there must be differences there. So, to the extent that it opens our eyes and helps us appreciate the problems that some people might have ... we have good social intercourse within the bench, we meet regularly, have dinner regularly, talk regularly ... and if that rubs off on us then without that input, I think we would be the poorer judges.¹⁶⁰

Another judge added: 'Once the High Court judges start being appointed on a basis which is more representative of the community at large, I think that will increase confidence.'¹⁶¹ However, a more senior judge's response was telling. He acknowledged the difference the women might make at the Bar, but did not extend this to the judiciary. He said: '[w]omen at the Bar have made a difference. They've had a civilising influence. There's now less of the roughness of a boys' club.'¹⁶²

158 L.H. Schafran, 'Women in the Courts Today: How Much Has Changed?' (1988) 2 *Law and Inequality* 27–34.

159 S. Ebadi, *Iran Awakening: A Memoir of Revolution and Hope* (2006).

160 Respondent Y.

161 Respondent Z.

162 Respondent V.

CONCLUSION

Notwithstanding the lack of a radical voice among women judges in Northern Ireland, there appears to be evidence of some acknowledgement of difference to men judges, namely: experiential sensitivities that may inform judging, changes to the working environment, and being role-models for other women. A number of women judges also identified attributes for judicial office which were not identified by male respondents. In general, women judges did not suggest they would decide differently, but their responses also reflect nuances in understanding the role of judicial office that are not shared by male judges. These are tentative conclusions given the small sample, and due to the fact that there may have been some response bias due to the remit of the research. Further research could help test this tentative conclusion, for instance, by comparing women judges' responses with their judgments, particularly if these could be compared with those of men in the same or similar cases (though it needs to be remembered that no women in Northern Ireland hold an appellate position).¹⁶³ A number of the experiential sensitivities revealed by the women judges in Northern Ireland are not unlike those found by Abrams in her analysis of accounts by African-American judges about how the latter perceived their roles. She argues that they reflected 'deep and nuanced familiarity with the (varied) circumstances and life patterns of members of the African-American community.'¹⁶⁴ She continued to state that this familiarity 'need not determine outcomes, but often shapes the terms in which cases are conceived, or parties characterized.'¹⁶⁵ She concludes that:

[o]ne interesting aspect of these patterns of judicial perception is that they can be understood *not* as moving judges in the direction of greater partiality toward members of their group, but as *eliminating the barriers* ... that have prevented some judges from addressing these group members fairly when they come before the court.¹⁶⁶

The differences amongst the women judges interviewed in this research in Northern Ireland, when combined with accounts from a sample of judges' accounts elsewhere, appear not only to confirm but manifest Rackley's thesis that 'the pursuit of difference reveals the contingency of traditional accounts of legal reasoning and the possibility of alternative and diverse adjudicative voices which are not necessarily feminine or *feminist* in intonation.'¹⁶⁷

163 Further research is also required on the intersectionality of disadvantage, across two or more axes of identity.

164 K. Abrams, 'Black Judges and Ascriptive Group Identification' in *Norms and the Law*, ed. J.N. Drobak (2006) 208–29, at 226.

165 *id.*

166 *id.*, emphasis added.

167 E. Rackley, 'Difference in the House of Lords' (2006) 15 *Social & Legal Studies* 163–85, at 165.

Women judges elsewhere have argued for attaining a judiciary that broadly reflects a spectrum of experience and awareness: a ‘multiplicity of voices’,¹⁶⁸ or ‘multiple consciousness’.¹⁶⁹ This approach is consistent with a number of rationales for more women, and, indeed, other under-represented minorities on the bench, which are: democratic legitimacy, trust, public confidence in the judiciary, and diversity. Such an approach may disrupt the tendency for judges to assume that society shares social, economic or moral values, at least as these are reflected in the concept of the ‘public interest’ or the persistent fiction of the ‘reasonable man’. The argument for more women in the judiciary based on diversity alone is relatively weak, even if it ultimately leads to the judiciary ‘looking like’ the rest of the population, unless that diversity in gender, race, class, sexual orientation, and disability¹⁷⁰ is also reflected in a diversity of views that *also* reflects those backgrounds across the judiciary as a whole.

The argument for greater diversity on the basis of gender, or indeed other variables such as race, cannot be justified in terms of essential differences, nor can the argument be based only on arguments about equality and representation, though those arguments are strong to redress the historical exclusion of women. The framing of arguments based on equality and difference in dichotomous terms denies a much more complex field that requires understanding of the social construction of the judge, judging, and judicial authority, and the associated exclusion of outsider groups.¹⁷¹ A thought experiment reveals the limitations of such an approach. If it were possible to create a ‘virtual’ judiciary that looked exactly like the groups that one wished to see represented in judicial office, it could be said that the judiciary was ‘diverse’ and that the problem of under-representation was solved. If, as is claimed by proponents of the representation-only rationale, differences are not and should not be detectable in the approach to and outcome of judging, one would wish to electronically programme the virtual judiciary to apply the law automatically and consistently to every same-fact situation. Yet, this manifestly negates the concrete particularities of human existence. Moreover, no programme could conceive of the programming permutations necessary for disposition of all cases over time, given law’s necessary lability and indeterminacy, and the disparate impact that judicial background and experience has on adjudication. This should serve as a

168 K.M. Werdegar, ‘Why a Woman on the Bench?’ (2001) 16 *Wisconsin Women’s Law J.* 31–40, at 40.

169 L’Heureux-Dubé, *op. cit.*, n. 64, approving M. Matsuda, ‘When the First Quail Calls: Multiple Consciousness as Jurisprudential Method’ (1989) 11 *Women’s Rights Law Reporter* 7–10.

170 For a recent initiative in the United Kingdom, see Department for Constitutional Affairs, *Action Plan on Disability Equality and Judicial Appointment* (2005).

171 G. Bock and S. James (eds.), *Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (1992).

reminder that law is given meaning by, amongst other things, the different perspectives and influences of its judges. The argument is not only about gender, but also about experience and background. A more compelling rationale for greater diversity in the judiciary lies in a synthesis of arguments about representation and probable difference based upon background and experiences. The denial that difference can exist in judicial authority, however it may play out, negates the possibility of judicial understanding of the standpoint position of the other, for the other cannot exist, in such terms, as different from the judge.¹⁷² Rather than suggesting that women judges will reach different decisions from those of men, this article suggests the need to pay closer attention to any distinctive approaches that women judges themselves report, in the context of reconsidering notions of judging and judicial authority.

172 S. Benhabib, 'The Generalized Other and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Moral Theory' in *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies*, eds. S. Benhabib and D. Cornell (1987) 77–95, at 77.